Filed 8/17/16 Marriage of Walker CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| In re Marriage of CHERYL A. and ROY M. WALKER. | |
| CHERYL A. WALKER,<br>Appellant,<br>v.<br>ROY M. WALKER,<br>Respondent. | G051092<br>(Super. Ct. No. 06D008316)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Nathan R. Scott, Judge. Affirmed.

Paul W. Samarin for Appellant.

The Law Offices of Saylin & Swisher, Brian G. Saylin and Lindsay L. Swisher for Respondent.

* * *

Cheryl A. Walker began working for the Long Beach Police Department eight years before she married Roy Walker.[1] She became disabled during the marriage and received a disability pension. Upon dissolution of the marriage, Roy claimed the community estate has an interest in Cheryl's disability pension. Cheryl disagreed, asserting the community estate has no interest in her disability pension. The court agreed with Roy, ruling that the community estate has an interest in Cheryl's disability pension to the extent it replaces a service pension. Cheryl appeals from the judgment. As explained below, we agree with the court's analysis and affirm the judgment.[2]

## FACTS

Cheryl was employed by the Long Beach Police Department in 1985. She married Roy in 1993. In 2001, at the age of 45, after being injured on the job, she received an "Industrial Disability Retirement award." The award was 50 percent of her income, with no additional credit for years of service. The parties separated in 2006.

Cheryl and Roy dispute the characterization of Cheryl's disability retirement award. At trial, Cheryl contended her disability retirement award was entirely her separate property. Roy contended that the "portion of [Cheryl's] disability pension over and above what she would have received as her pension would be her separate

---

[1] For convenience and clarity, we will refer to the parties by their first names. No disrespect is intended.

[2] The parties and the court characterized the ruling as a "[j]udgment on reserved issues," According to the register of actions, the subject of this appeal — the October 6, 2014 "judgment" — is the third "judgment" entered in this decade-old dissolution proceeding. The resulting appeal is also Cheryl and Roy's second trip to this court. We observe that piecemeal litigation, seemingly accepted as a common practice in the family law courts, unnecessarily burdens the parties with additional avoidable expense.

property, and the rest should be considered community property, to be divided accordingly." Cheryl submitted a brochure from the California Public Employees' Retirement System (CalPERS) that described an "Industrial Disability Retirement" as applying "to you if you become disabled from a job-related injury or illness and can no longer perform the duties of your job. . . . . Industrial disability retirement has no minimum age or service credit requirement." It thus stands in contrast to "Service Retirement," which requires at least five years of service credit and age 50.

In December 2012, the court determined the community had an interest in Cheryl's disability income, stating, "Case law supports [Cheryl's] contention that the disability income received until she reached age 50 was to compensate her and the community for lost earnings and pain and suffering. However, once [Cheryl] reached the age of 50 and became eligible for longevity retirement, the community has an interest in same." "Although [Cheryl] had a claim for a disability allowance at ages 47 and 49, at age 50 she would have been eligible for a disability *retirement* allowance. A party cannot use disability retirement to defeat the other party's claim to a community property interest in a longevity retirement earned during the marriage that would have been otherwise available."

Cheryl moved for a new trial, contending the court erred in concluding Cheryl was eligible for longevity retirement at age 50. The court granted the motion and set a new trial on "the issue of characterization and valuation of [Cheryl's] disability/longevity retirement . . . ." A different judge then held a hearing on the new trial without taking evidence and ultimately agreed with the first judge that the community had an interest in Cheryl's disability retirement. Cheryl appealed.

## DISCUSSION

The parties agree the facts are not in dispute. The issue before us is thus a legal issue or mixed question of law and fact that we review de novo.

We begin our discussion with *In re Marriage of Justice* (1984) 157 Cal.App.3d 82 (*Justice*), a case closely on point that both parties discuss extensively. In *Justice*, the husband worked for the Los Angeles Police Department throughout the marriage. At the time of their separation, husband had worked 16.6 of the 20 years needed to become eligible to participate in his pension plan. Accordingly, when the parties divorced, the court awarded wife "'[a]n amount equal to one-half of 16.6/20 of the amount Respondent would receive upon his retirement on August 6, 1982 from the Los Angeles Police Department when his Pension Plan at the Los Angeles Police Department vests," with payments to begin after he became eligible. (*Id*. at p. 85.) Shortly before he became eligible for the pension plan, however, he was retired from the police department, and was given a "service-connected disability pension . . . ." (*Ibid.*) Husband refused to pay wife any share of the disability pension, arguing it was not subject to the court's order. The court ordered him to pay, and husband appealed. (*Id.* at p. 85-86.)

In affirming the trial court's order, the *Justice* court noted the case before it was unique in that, unlike prior case law, the husband did not have enough service years to qualify for a service pension when he went on disability retirement. (*Justice, supra*, 157 Cal.App.3d at p. 88.) Thus the husband did not, as in prior cases, elect a disability pension in an attempt to defeat wife's community interest in a service pension. This was not dispositive, however, as the court relied on the principle that "the separate or community character of a 'disability' pension is not determined by its label, but by its primary function or objective once its recipient reaches normal retirement age." (*Id.* at p. 88.) Citing *In re Marriage of Stenquist* (1978) 21 Cal.3d 779, 787 (*Stenquist*), a case involving a military retiree, the *Justice* court noted that the purpose of a disability

pension is, in part, "'to compensate the disabled veteran for "the loss of earnings resulting from his compelled premature military retirement and from diminished ability to compete in the civilian job market" [citation] and secondarily to compensate him for the personal suffering caused by the disability. Military retired pay based on disability, however, does not serve those purposes exclusively. Because it replaces a "retirement" pension, and is computed in part on the basis of longevity of service and rank at retirement, it also serves the objective of providing support for the serviceman and his spouse after he leaves the service. Moreover, as the veteran approached normal retirement age, this latter purpose may become the predominate function served by the 'disability' pension.' [Citation.] Applied to the instant case, these factors compel the conclusion that a portion of [husband's] disability pension is community property." (*Justice, supra*, 157 Cal.App.3d at pp. 88-89.) The court went on to hold that the disability pension was community property, except to the extent that the amount awarded exceeded what would have been awarded under a service pension. (*Id.* at p. 89.)

Here, the trial court found that "*Justice* must prevail," and noted that in *Justice*, husband's "disability benefit depended on the extent of his disability, not his service time." Cheryl takes issue with the court's interpretation of the *Justice* opinion, arguing that while her disability pay is not based on years of service, the husband's pay in *Justice* was, and this distinction leads to an opposite result here. Cheryl's argument fails on multiple fronts.

First, the trial court read *Justice* correctly, and Cheryl reads it incorrectly. Cheryl relies on the following quote from the *Justice* opinion: "Under the Los Angeles Police Department retirement system, a member's 'normal pension base' [citation] is used to determine both the amount of a service pension and the amount of a service-connected disability pension: The monthly service retirement benefit is computed by applying to the normal pension base a percentage determined by the length of the retiree's service [citation]; the monthly disability retirement benefit is computed by

applying to the normal pension the percentage of the retiree's disability [citation]." (*Justice, supra,* 157 Cal.App.3d at p. 89.) From this Cheryl concludes, "Accordingly, Mr. Justice's award was computed by first determining . . . what his normal retirement amount would have been, based on his years of service earned, and then applying the percentage of disability to that amount." That is not how we read *Justice*. Rather, the "normal pension base" is modified by years of service in a service retirement, and extent of disability in a disability retirement. The trial court got it right.

Second, even if it mattered whether a disability retirement was based on years of service, while Cheryl's benefit may not have been directly computed based on years of service, the formula used — 50 percent of her income at the time of disability — surely reflected her 16 years of service since incomes generally rise over time.

Third, whether the disability retirement is calculated based on years of service is not dispositive. What matters is the purpose of the disability award — was it meant to replace a service retirement? To the extent it is calculated based on years of service, it becomes fairly obvious that it replaces a service retirement. But that is not the only way to determine its purpose. Here, for example, Cheryl's disability pay is specifically described as a "retirement." It is based on Government Code section 20000 et seq., which is labeled the "Public Employees' Retirement Law." Government Code section 20001 describes the purpose of the Public Employees' Retirement Law as follows: "The purpose of this part is to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated *or otherwise incapacitated* may, without hardship or prejudice, be replaced by more capable employees, and to that end provide *a retirement system* consisting of *retirement compensation* and death benefits." (Italics added.) These pronouncements leave no room for doubt. Industrial disability retirement is a retirement, and it is intended to replace service retirement.

In contending Cheryl's disability retirement is separate property, Cheryl begins with a "presumption that a disability award is personal to the injured party, and therefore, his/her separate property," which Cheryl describes as a "longstanding" presumption. Cheryl derives this presumption from *In re Marriage of Jones* (1975) 13 Cal.3d 457 (*Jones*), where our high court stated, "On this appeal, we hold that a married serviceman's right to disability pay, unlike a vested right to retirement pay, does not comprise a community asset and thus does not become subject to division upon dissolution of the marriage. Such disability pay is not a form of deferred compensation for past services. Rather, it serves to compensate the veteran for the personal anguish caused by the permanent disability as well as for the loss of earnings resulting from his compelled premature military retirement and from diminished ability to compete in the civilian job market. These losses and disabilities fall upon the disabled spouse, not on the uninjured and healthy one; hence, upon dissolution of marriage, the right of the disabled spouse to future disability payment should be his separate property." (*Id*. at p. 459.)

But the California Supreme Court almost immediately undercut its holding in *Jones*.[3] Writing just three years later, Justice Tobriner, who was also the author in *Jones*, chronicled the swift decline of *Jones*: "In *Jones*, we held that when a spouse is entitled to receive a pension only because he is disabled, and *has no right to a pension because of longevity of service*, the disability benefit payments are his separate property upon dissolution of the marriage. At the time *Jones* was decided, however, we deemed the community interest in a nonvested retirement pension a mere expectancy, and not a property interest." (*Stenquist*, *supra*, 21 Cal.3d at pp. 785.) "One year following our decision in *Jones* we overturned past precedent and held in *In re Marriage of Brown, supra*, 15 Cal.3d 838, that pension rights, whether or not vested, constituted a property interest; that to the extent that such rights derive from employment during coverture, they

---

[3] In citing this case, Cheryl's counsel failed to note it has been disapproved in subsequent cases.

now comprise community assets. This holding undermines the fundamental premise of *Jones*: that the award of a serviceman's 'disability' pension to the serviceman as his separate property would not impair any community interest of his spouse. Under current law — in contrast to the law prevailing when *Jones* was decided — both the nonvested retirement pension in *Jones* and the husband's vested right to a 'retirement' pension in the present case constitute valuable community assets deserving of judicial protection." (*Ibid.*)

Finally, Cheryl cites *In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, which held that a private disability insurance policy purchased by a party before marriage is separate property. Cheryl argues that, by analogy, an employer-provided disability retirement should be separate property where the employment began before marriage. What sets a disability pension apart from a private insurance policy, however, is that a disability pension replaces a valuable community asset — a service pension.[4] Treating a disability pension as separate property would, therefore, visit hardship on the other party. (*See Stenquist, supra,* 21 Cal.3d at p. 786 ["'[o]ver the past decades, pension benefits have become an increasingly significant part of the consideration earned by the employee for his services. As the date of vesting and retirement approaches, the value of the pension right grows until it often represents the most important asset of the marital community. . . . A division of community property which awards one spouse the entire value of this asset, without any offsetting award to the other spouse, does not represent that equal division of community property contemplated by [the Family Law Act].'"].) A private insurance policy, by contrast, does not replace a valuable community asset, and thus can be analyzed under the usual time-of-acquisition framework. (*In re Marriage of*

[4] At trial, Cheryl's counsel acknowledged the disability pension replaces a service pension. The court inquired of Cheryl's counsel, "But what you're saying is that she had been earning retirement for 16.019 years, and then as soon as she went out on industrial disability, that retirement kind of just went away." Counsel responded, "It didn't kind of went away, it absolutely went poof . . . ."

*Rossin, supra*, 172 Cal.App.4th at p. 737 ["Under the circumstances of this case, time of acquisition is determinative. Because the right to disability benefits accrued prior to marriage, it is separate property. Our analysis properly ends there"].)

## DISPOSITION

The judgment is affirmed. Roy shall recover his costs incurred on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.